No. 91-7849

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN BUCKLEY,

Petitioner,

v.

J. MICHAEL FITZSIMMONS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PROSECUTORIAL IMMUNITY APPLIES TO ALLEGATIONS OF PRE-INDICTMENT INTERROGATIONS AND MANIPULATION OF EVIDENCE WHICH CAUSE INJURY ONLY THROUGH THE PRESENTATION OF GRAND JURY AND TRIAL TESTIMONY.

II. WHETHER ABSOLUTE IMMUNITY APPLIES TO A PROSECUTOR'S ANNOUNCEMENT OF A CRIMINAL INDICTMENT WHICH ALLEGEDLY INTERFERES WITH A CRIMINAL DEFENDANT'S RIGHT TO A FAIR TRIAL.

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE[1]

The Murder and Initial Investigation

On February 25, 1983, eleven year old Jeanine Nicarico was abducted from her home in Naperville, Illinois and then sexually abused and murdered (J.A. 6, para. 19). Her body was found a few days later along a prairie path in DuPage County, Illinois (J.A. 6, para. 19).

An intensive investigation into the murder was initiated under the direction of DuPage County Sheriff Richard Doria and DuPage County State's Attorney J. Michael Fitzsimmons (J.A. 6-7, para. 20). During the early stages of the investigation, a boot print was discovered on the door of the Nicarico home, and Sheriff's detectives concluded that it was left by the killer (J.A. 7, para. 22). At approximately the same time, an individual named Alex Hernandez told Sheriff's Detectives that Petitioner was present during a conversation in which the murder was discussed (J.A. 7, para. 22).

Armed with that information, Sheriff's Detectives went to Petitioner's home and questioned him without a lawyer (J.A. 7, para. 23). Petitioner denied any knowledge of the crime and voluntarily turned over his boots for comparison with the boot print (J.A. 7, para. 23).

At about the same time, Defendants were supplied with a description and an F.B.I. sketch of an individual reportedly seen near the Nicarico home on the afternoon of the

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[1] The Statement of the Case is drawn solely from Petitioner's First Amended Complaint, and is accepted as true only for purposes of Respondents' claim to absolute immunity. Nonetheless, Respondents respectfully request that any opinion rendered by this Honorable Court reflect their denial of the allegations of wrongdoing, despite its irrelevance to the Court's task.

abduction (J.A. 7, para. 23). The description and sketch were dissimilar to Petitioner (J.A. 7, para. 23).

Development of Boot Print Evidence

John Gorajczyk, a deputy sheriff in charge of the identification section of the DuPage County Crime Lab, compared the soles of Petitioner's boots with the boot print and concluded that they did not match (J.A. 7, para. 24). Gorajczyk confirmed this conclusion with the head of the crime lab and his finding also was conveyed to Sheriff Doria, and Respondents Fitzsimmons, Knight and King (J.A. 8, para. 25).

Sheriff Doria then caused Petitioner's boots to be removed from Gorajczyk and sent to Defendant Edward German of the Illinois Department of Law Enforcement Crime Lab (J.A. 8, para. 26). German initially noted that Petitioner's boot "could have at best" made the boot print and that "another shoe could very well have made the prints" (J.A. 8, para. 27). German's official report stated that Petitioner's boot "could have" made the prints (J.A. 8, para. 27). German's initial notes and his official report were divulged to Sheriff Doria, Respondent Fitzsimmons and their subordinates (J.A. 8, para. 27).

Unsatisfied with German's conclusions, Respondents Knight and Fitzsimmons, and various other Defendants contacted Dr. Louise Robbins, an anthropologist, and Robert Olsen of the Kansas Bureau of Identification Crime Lab in search of a positive identification (J.A. 8, para. 28). After reviewing German's notes and report, but without actually viewing Petitioner's boot, Olsen concluded that Petitioner's boot and the boot print shared "similar class characteristics, but the paucity of sufficient similar individual characteristics precluded a positive identification" (J.A. 8-9, para. 29). These findings were made known to Respondents Knight, Fitzsimmons and King (J.A. 9, para. 30).

Respondent Knight and certain Sheriff's Department detectives then allegedly "procured a positive identification" from Dr. Louise Robbins, even though they knew or should have known that her theories and reputation were "generally discredited and viewed with great skepticism" in the forensic community (J.A. 9, para. 31).

Interrogations of Suspects and Witnesses

During the early stages of the investigation, Respondents Knight and King participated in the interrogation of witnesses and potential suspects without counsel, including Petitioner and Alex Hernandez (J.A. 9, para. 32). Despite Respondents' alleged use of intense pressure and intimidation, Petitioner maintained his innocence and demonstrated no knowledge of the crime (J.A. 9, para. 32). Petitioner further alleges that Hernandez' stories were so wildly and palpably false that his mental instability was obvious (J.A. 9-10, para. 32). At least one experienced Sheriff's detective who participated in these interrogations told Respondents Knight and King, and several Sheriff's detectives, that neither Petitioner nor Hernandez were involved in the Nicarico crimes (J.A. 10, paras. 33, 34).

Grand Jury Proceedings

Unable to solve the case, Respondents Fitzsimmons, Knight and King, and Sheriff Doria convened a special DuPage County "investigative" grand jury, devoted solely to the Nicarico case (J.A. 10, para. 35). Respondents, and certain Sheriff's Department detectives, allegedly used the grand jury as an investigative tool, by intimidating and badgering potential suspects, including Petitioner, without counsel (J.A. 10, para. 36). Despite the "strong-armed interrogation techniques," Petitioner continued to maintain his innocence before the grand jury (J.A. 10, para. 36).

Respondents allegedly presented the grand jury with only "favorable portions" of the boot print evidence, intentionally withheld Gorajczyk's findings, and misrepresented Olsen's and German's conclusions (J.A. 10-11, para. 37). Petitioner claims that Respondents "presented a large amount of obviously incredible, irrelevant, false and contradictory hearsay and double hearsay evidence designed to improperly prejudice the [Petitioner] and other suspects before the grand jury" (J.A. 11, para. 38).

Petitioner alleges that several Sheriff's Department Defendants, and Respondents Knight and King, offered reward money to induce Alex Hernandez to give false and inculpatory testimony (J.A. 11, para. 39). This testimony was placed before the grand jury even though it was false and completely unreliable (J.A. 11, para. 39).

Respondent Knight allegedly participated in the interrogation of a third suspect, Rolando Cruz, without counsel, and offered him financial payments and a rent-free apartment in exchange for inculpatory grand jury testimony which lacked credibility (J.A. 11, para. 40).

On January 27, 1984, more than eight months after the grand jury had convened and over one hundred witnesses had testified, Respondent Fitzsimmons publicly admitted that he lacked sufficient evidence to indict (J.A. 11, para. 41). This announcement came four months after the presentation of the boot print evidence to the grand jury (J.A. 11, para. 41).

The Indictment and Attendant Political Climate

The expansive publicity and intense emotions engendered by the crimes exerted great public pressure upon the Respondents to find someone to charge and prosecute (J.A. 7, para. 21). This political pressure allegedly resulted in Petitioner's grand jury indictment on March 9, 1984, just

twelve days prior to the Republican primary for State's Attorney, even though no new evidence of importance was presented to the grand jury after Fitzsimmons' announcement of January 27, 1984 (J.A. 12, para. 42).

Petitioner alleges that Respondents Fitzsimmons, Knight and King, and Sheriff Doria, were responsible for securing grand jury indictments for murder, rape and burglary against Petitioner, Hernandez and Cruz (J.A. 12, para. 42). Those indictments were allegedly obtained without probable cause so as to (1) diffuse public pressure; (2) cover up the inability to solve the crime; (3) help Respondent Fitzsimmons in his political campaign; and, (4) coerce Petitioner, Hernandez and Cruz to reveal information about the crime and/or falsely inculpate themselves or each other (J.A. 12, para. 43).

Publicity Surrounding the Indictment

Respondent Fitzsimmons publicly announced the indictments, and allegedly asserted falsely that numerous pieces of evidence, including the boot print evidence, indicated that Petitioner, Hernandez and Cruz were part of a burglary ring which committed the Nicarico crimes (J.A. 12, para. 44). Fitzsimmons also released mug shots of Petitioner, Hernandez and Cruz to the media which were prominently and repeatedly displayed on television and in the newspapers (J.A. 12, para. 44). According to Petitioner, Respondent Fitzsimmons' false and prejudicial statements inflamed the populace of DuPage County against him and his co-indictees (J.A. 12, para. 45).

Post-Indictment/Pre-Trial Occurrences

After his indictment, Petitioner was arrested and imprisoned on a three million dollar ($3,000,000) bond, allegedly at the direction of Sheriff Doria, Respondent Knight

and a Sheriff's Detective (J.A. 12-13, para 46). Respondents Knight and King, and various Sheriff's detectives again interrogated Petitioner, Hernandez and Cruz, offering them immunity from the death penalty in return for false admissions or false statements against each other (J.A. 12-13, para. 46). Despite these efforts, Petitioner continued to declare his innocence, while Hernandez retracted his prior admissions, claiming they had only been uttered in an attempt to secure the reward money (J.A. 13, para. 47). Petitioner claims the post-indictment interrogations re-enforced the innocence of Petitioner, Hernandez and Cruz (J.A. 13, para. 48).

Respondents continued to ignore a Sheriff's detective's contention that the wrong individuals were in custody (J.A. 13, paras. 48-49). This same detective was allegedly removed from the Nicarico investigation and given unfavorable assignments as a result of his pursuit of a lead concerning another suspect (J.A. 13, par 49). The head of the DuPage County Crime Lab was allegedly forced to resign for similar reasons (J.A. 13, para. 49).

Respondents Knight and King allegedly helped secrete Gorajczyk's opinion on the boot print from Petitioner's defense lawyers, who discovered Gorajczyk's opinion only through independent investigation on the eve of trial (J.A. 13, para. 50).

Political Change and Petitioner's Criminal Trial

In March, 1984, James Ryan defeated Respondent Fitzsimmons in the Republican primary (J.A. 14, para. 51). Ryan was elected in the November, 1984 general election (J.A. 14, para. 51). After taking office in December, 1984, State's Attorney Ryan appointed Respondent Knight as the Nicarico case special prosecutor and authorized Petitioner's continued imprisonment and prosecution (J.A. 14, para. 52).

Petitioner's trial began in January, 1985, under the direction of Ryan and First Assistant State's Attorney Robert Kilander (J.A. 14, para. 54). Respondents Knight and King selected a jury and jointly tried Petitioner, Hernandez and Cruz in a highly prejudicial and inflamed atmosphere, occasioned, at least in part, by the Respondents' public statements (J.A. 14, para. 54).

During trial, the prosecutors presented the boot print evidence as the cornerstone of the State's case through the testimony of Dr. Robbins, Edward German and Robert Olsen (J.A. 14, para. 55). The experts allegedly testified falsely and, in the case of Olsen and German, inconsistently with their original reports and notes (J.A. 14, para. 55).

The prosecutors also introduced the false, inculpatory statements of Hernandez and Cruz, which had been secured through coercive interrogations, promises or rewards, and other financial inducements (J.A. 15, para. 56).

The jury was hung as to the Petitioner's guilt or innocence and the court declared a mistrial (J.A. 15, para. 57). Hernandez and Cruz were convicted of the rape and murder of Jeanine Nicarico (J.A. 15, para. 57).

Decision to Re-Try and Attendant Publicity

Respondents participated in the decision to re-try Petitioner (J.A. 15, para. 58). Respondent Knight publicly announced this widely reported decision immediately after the verdicts were returned (J.A. 15, para. 58).

In addition, Respondent Fitzsimmons made post-trial public statements falsely claiming that Petitioner was guilty (J.A. 15, para. 59). Furthermore, various Respondents and Sheriff's Department Defendants, including Knight and Doria, allegedly continued to make prejudicial public statements and manipulate press coverage which prompted the Nicarico family and their friends to make inflammatory

public statements claiming that Petitioner was guilty (J.A. 15, para. 59).

Brian Dugan's Confession and the F.B.I. Report on the Boot Print Evidence

In June, 1985, Brian Dugan of Aurora, Illinois, was charged with several sexual assaults in Kane County, Illinois, including the murder and rape of seven year old Melissa Ackerman (J.A. 15, para. 60). Respondents were notified that Dugan should be investigated because of the similarities between the Ackerman and Nicarico murders (J.A. 15-16, para. 60).

Dugan told his public defender that he was responsible not only for the Melissa Ackerman crimes, but also that he murdered and raped Jeanine Nicarico and a woman named Donna Schnnor (J.A. 16, para. 61). The public defender took a statement from Dugan concerning the Nicarico murder (J.A. 16, para. 61). Dugan claimed he acted alone and related details which had not been publicly revealed and allegedly could only have been known to the murderer (J.A. 16, para. 62).

In November, 1985, Dugan's confession was conveyed to Knight, Kilander, Ryan and certain Sheriff's Detectives (J.A. 16, para. 62). Dugan's attorney proposed that his client would plead guilty to all three murders and rapes in exchange for life sentences (J.A. 16, para. 63). Though the pleas were accepted by prosecutors from Kane County and LaSalle County, Illinois, Respondents refused to accept the plea (J.A. 16, para. 63).

Respondents refused to dismiss the charges even after Dugan passed a polygraph test in December, 1985, in which he again claimed sole responsibility for the Nicarico murder, and also after he gave a detailed videotaped confession under hypnosis (J.A. 16, para. 64). Respondent

Knight made false and misleading public statements discrediting Dugan's confession and prejudicing Petitioner (J.A. 16-17, para. 65).

Respondents persisted in their refusal to dismiss the charges against Petitioner despite the conclusion of a "highly respected" F.B.I. foot print expert in June, 1986, that Buckley's boot did not match the boot print (J.A. 17, para. 66).

Dismissal of the Criminal Charges

In September, 1986, Robert Kilander procured a continuance in Petitioner's retrial because a prisoner in the DuPage County Jail had purportedly advised him (Kilander) that Petitioner had made a highly inculpatory statement (J.A. 17, paras. 67-68). The statement appeared in the media even though Petitioner's criminal defense lawyers allegedly established a short time later that Petitioner never made the statement (J.A. 17, para. 68). Furthermore, the prisoner allegedly denied telling Kilander that Petitioner had ever made the inculpatory statement (J.A. 17, para. 68).

In January, 1987, Respondents sought another continuance because Dr. Robbins was seriously ill and unable to travel from North Carolina to DuPage County for the trial (J.A. 17, para. 69). Fearing that Dr. Robbins was terminally ill, Petitioner's defense lawyers requested a videotaped examination for use at trial, but the prosecution opposed this request and it was denied (J.A. 17-18, para. 70). Dr. Robbins died in March, 1987, after which Respondents dismissed the charges against Petitioner (J.A. 18, para. 71).

Petitioner claims that Respondents, and several Sheriff's Department members used Dr. Robbins' death as a pretext to publicly explain the dismissal, rather than admit that Petitioner was innocent (J.A. 18, para. 72). This pre-

textual justification was widely reported by the media (J.A. 18, para. 73).

Current Status of the Nicarico Prosecution

Alex Hernandez and Rolando Cruz appealed their convictions and death penalties to the Illinois Supreme Court which reversed, concluding that Hernandez and Cruz should have been tried separately. *People v. Cruz*, 121 Ill.2d 321, 521 N.E.2d 18, *cert. denied*, 488 U.S. 869 (1988); *People v. Hernandez*, 121 Ill.2d 293, 521 N.E.2d 25, *cert. denied*, 488 U.S. 869 (1988). Both Hernandez and Cruz were retried, and again convicted. The Illinois Supreme Court recently affirmed Cruz' conviction and the imposition of the death penalty. *People v. Cruz*, 1992 WL 356036 (Ill.Sup.Ct. Dec. 4, 1992).[2] Hernandez' appeal from his second conviction and imposition of an eighty year sentence is pending in the Illinois Appellate Court.

SUMMARY OF THE ARGUMENT

The scope of absolute prosecutorial immunity should be carefully crafted to protect the independence and integrity of the judicial process without unnecessarily restricting a victim's right of redress. This goal can be achieved through a functional approach under which immunity applies to those acts which cause injury through the judicial process, but not to those investigative or administrative acts which injure citizens without regard to the judicial process and its attendant procedural safe-

[2] Petitioner's reference to a newspaper story and a magazine article indicating that certain law enforcement personnel believe the wrong men were prosecuted (Petitioner's Brief, pp. 10-11) constitutes an inappropriate effort to inject extraneous and irrelevant opinions into the record.

guards. *Compare Imbler v. Pachtman*, 424 U.S. 409 (1976) (immunity from malicious prosecution) *with Burns v. Reed*, 111 S.Ct. 1934 (1991) (only qualified immunity from false arrest).

To assess those forms of prosecutorial conduct which are within the umbrella of absolute immunity, the Court need not blindly adhere to the phraseology chosen by the Petitioner to describe a particular act. In order to prevent *Imbler* from being whittled to a mere pleading rule, the Court should focus on the underlying nature of Petitioner's cause of action in order to fairly categorize the true prosecutorial acts at issue. For from a novel approach to resolving immunity issues, the court of appeals' focus on the nature of Petitioner's cause of action to help delineate the targeted act is well-grounded in this Court's various decisions interpreting the scope of official immunities.

Applying such an approach in the instant case exposes Petitioner's claims, assertedly premised on out-of-court interrogations and manipulation of boot print evidence, to be a disguised attack on the prosecutors' alleged eliciting of tainted testimony before the grand and petit juries. Indeed, with respect to the interrogations, Petitioner has expressly conceded that he was injured only through the introduction of the fruits of the interrogations at trial and to the grand jury. The eliciting of testimony lies at the very heart of the prosecutors' quasi-judicial function for which immunity was conferred in *Imbler*.

The mere titling of a claim as one for false arrest does not alter the scope of the prosecutors' immunity for the conducting of grand jury proceedings. While neither prosecutors, police officers nor other public officials have traditionally been accorded absolute immunity from false arrest, the common law, historical tradition and public policy all lend compelling support for application of absolute immunity to a prosecutor's conduct of grand

jury proceedings. For that reason, Petitioner's claim for false arrest fails to circumvent absolute immunity to the extent it simply represents another way of suing the prosecutors for their efforts to seek and obtain an indictment. To the extent Petitioner sues the individual prosecutors for false arrest on account of injuries suffered aside from the grand jury's return of an indictment, Respondents have no quarrel with the court of appeals' denial of absolute immunity.

Petitioner's claim for deprivation of a fair trial stemming from Respondent J. Michael Fitzsimmons' inflammatory announcement of his indictment is treated separately. This is because, unlike the claims based upon the interrogations and alleged manipulation of evidence, Petitioner's unfair trial claim against Fitzsimmons does not involve prosecutorial conduct which truly occurred within the confines of the courtroom. To the contrary, that particular claim targets a prosecutor's out-of-court act which was intended to tilt the trial process in the State's favor.

This Court has recognized that immunity must, in certain circumstances, extend to a prosecutor's acts beyond the courtroom when both the common law and the policies underlying principles of absolute immunity so require. These principles support the application of absolute immunity to a prosecutor who is sued for deprivation of a fair trial. The common law often applied absolute immunity to prevent the relitigation of judicial determinations in a civil damages suit against judicial officers. Although the common law never specifically addressed the scope of immunity for a prosecutor's press statements, the impact of mass media on the fairness of criminal proceedings was never contemplated by the common law. Inasmuch as the scope of present day immunities need not precisely mirror common law immunities,

the long-standing tradition of immunizing judicial officers from malicious prosecution and unfair trial claims provides more than adequate support for the immunity sought by Respondent Fitzsimmons.

Moreover, the policy considerations upon which absolute immunity is premised provide compelling support to the extension of immunity to a prosecutor's announcement of an indictment which is alleged to have infringed on a criminal defendant's right to a fair trial. The public announcement of an indictment raises a significant threat of retaliatory litigation in the form of an unfair trial claim, particularly if that announcement constitutes the sole hook upon which a criminal defendant may achieve the relitigation of his criminal trial in a civil forum. Nonetheless, such announcements are required of a prosecutor in order to ensure that the public is informed of the important activities of the prosecutor's office. The harm suffered by victims of prejudicial pretrial publicity who are denied an avenue of civil redress against the culpable prosecutor is substantially minimized because of the wide array of procedural safeguards available to ward off external media influence over the trial process.

To ensure that the specter of entanglement in civil litigation does not deter prosecutors from vigorously pursuing indictments and prosecutions against suspected law violators, absolute immunity should be vigilantly applied when the prosecutor functions in an arena which is integral to the judicial process. In the present context, the Respondent prosecutors' pursuit of a grand jury indictment and criminal prosecution against Petitioner is precisely the type of conduct which was contemplated by this Honorable Court in extending immunity to prosecutors.

ARGUMENT

I. PROSECUTORIAL IMMUNITY APPLIES TO ALLEGATIONS OF PRE-INDICTMENT INTERROGATIONS AND MANIPULATION OF EVIDENCE WHICH CAUSE INJURY ONLY THROUGH THE PRESENTATION OF GRAND JURY AND TRIAL TESTIMONY

A. General Principles

> One of the greatest difficulties of the position is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives a complaint . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest and the proof the most certain.

Jackson, *The Federal Prosecutors*, 24 J.Am. Judicature Soc'y 18 (1940).

To ensure that prosecutors "who wield this power will be guided solely by their sense of public responsibility," rather than the fear of civil liability, they are absolutely immune from civil rights suits for malicious prosecution,[3] and for acts "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987). Prosecutorial immunity is derived from the common law grant of immunity to judicial officers for acts within the scope of their official capacities. *See, e.g., Bradley v. Fisher*, 80 U.S. (13 Wall) 335, 347, 351 (1871) (judges). This broad grant of immunity was extended to prosecutors because, as indicated above, they are integrally involved in the judicial process, and they are particularly susceptible to retaliatory lawsuits. The inhibition posed by the specter of entanglement in civil litigation could lead prosecutors to refrain from trying close cases or to withhold relevant evidence in cases of arguable admissibility for fear of the consequences of not prevailing. *Imbler*, 424 U.S. at 426.

[3] It is unsettled whether the common law tort of malicious prosecution, standing alone, is actionable under 42 U.S.C. § 1983. *Compare Albright v. Oliver*, 975 F.2d 343 (7th Cir. 1992) (malicious prosecution not a constitutional claim), *petition for cert. filed*, 61 U.S.L.W. 3403 (Nov. 12, 1992) *with Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989) (malicious prosecution redressable under § 1983), *cert. denied*, 494 U.S. 1081 (1990). Nonetheless, Petitioner's incarceration pending dismissal of the criminal charges constitutes a sufficient deprivation of liberty to permit a constitutional challenge to the circumstances of his prosecution. *See Albright*, 975 F.2d at 346.

While absolute immunity deprives victims of prosecutorial misconduct of an avenue of civil redress, the plethora of safeguards built into the criminal justice system to prevent and counter such misconduct minimizes the consequences of insulating prosecutors from the additional accountability achieved from exposure to civil rights liability. *See Burns v. Reed*, 111 S.Ct. 1934, 1939, 1942 (1991).

Imbler confirmed a prosecutor's immunity from malicious prosecution claims. However, it was not until *Burns* that this Court considered the scope of immunity for a prosecutor's participation in investigative conduct which gives rise to fourth amendment claims more traditionally brought against police officers. In concluding that qualified immunity was adequate to protect both police officers and prosecutors under such circumstances (*Burns*, 111 S.Ct. at 1943-44), the Court did not assess the scope of immunity available to a prosecutor who participates in the investigative process, but does not engage in any activity which violates the Constitution other than through the grand jury and criminal trial process. That question is squarely presented by the instant controversy.

To determine whether absolute immunity applies, this Honorable Court has traditionally applied a two-step ap-

proach. First, the Court seeks historical or common law support for the asserted immunity, although " 'the precise contours of official immunity' need not mirror the immunity at common law." *Burns*, 111 S.Ct. at 1943, *quoting Anderson v. Creighton*, 483 U.S. 635, 645 (1987). Second, the Court considers whether the policy considerations articulated in *Imbler* are furthered through application of immunity. *Burns*, 111 S.Ct. at 1941.

B. Petitioner's Claims of Pre-Indictment Prosecutorial Misconduct are Limited to the Interrogations and Manipulation of the Boot Print Evidence

Petitioner alleges that the prosecutors participated in a "year long pre-arrest and pre-indictment investigation" (Petitioner's Brief, p. 18). Such descriptive labels, however, are not useful in analyzing the scope of immunity for a particular function. Only through a fair characterization of the particular act targeted can the prosecutors' entitlement to immunity be properly determined.

As both lower courts acknowledged (J.A. 39, 92-93), Petitioner's complaint challenges only two aspects of pre-indictment prosecutorial activity aside from the conducting of grand jury proceedings. First, Petitioner charges Respondents Knight and King with pressuring and intimidating Petitioner and other potential suspects during interrogations without counsel. Nonetheless, Petitioner maintained his innocence, and Alex Hernandez told such wild and obviously false stories that his mental instability was allegedly obvious. After the grand jury was empaneled, Respondents allegedly offered financial inducements to Hernandez and Rolando Cruz in exchange for false inculpatory testimony.

Second, Petitioner charges the prosecutors with (1) suppressing Deputy Gorajczyk's opinion on the boot print; (2) convincing Edward German and Robert Olsen to alter

their initial opinions and reports; and, (3) procuring a positive boot print identification from Dr. Louise Robbins, who, according to Petitioner, was widely known to have been discredited and viewed with great skepticism.

C. Focusing on the Nature of Petitioner's Claimed Injury Helps Categorize the Challenged Act and Prevents the Dilution of *Imbler* Into a Mere Pleading Rule

1. The Interrogations

The crux of the dispute concerning the application of absolute immunity to the prosecutors' conducting of interrogations centers on the proper characterization of Petitioner's claims, as opposed to any significant divergence of views concerning legal doctrine or theory. Respondents acknowledge that immunity does not insulate prosecutors from constitutional accountability for illegal out-of-court interrogations (J.A. 93-95). The interrogation of witnesses and suspects during a criminal investigation is not fairly characterized as necessary to the judicial phase of the criminal justice process. Moreover, judicial safeguards are unavailable to counter the harm caused by out-of-court interrogations. Accordingly, the justifications for absolute immunity at both the common law and under § 1983 are absent.

These concessions, however, do not undercut Respondents' entitlement to absolute immunity because the interrogations did not violate Petitioner's constitutional rights. By focusing on the nature of Petitioner's claimed injury and, therefore, his cause of action, it is apparent that Petitioner is really seeking to hold the prosecutors accountable for eliciting allegedly false testimony before the grand and petit juries, rather than for the investigatory interrogations he purportedly targets. Indeed, Petitioner has expressly conceded that the only harm he at-

tributes to the interrogations of both himself and other suspects occurred "when the fruits of the interrogation were used in the criminal process (i.e., a statement was presented to the grand jury or at trial)" (Petitioner's original Petition for a Writ of *Certiorari*, No. 90-7574, p. 10 & n. 3).

Far from "a novel and radical extension of absolute immunity" (*see* Petitioner's brief, p. 17), the lower court's focus on the nature of the claimed injury is simply the most efficient and practical method of fairly categorizing the challenged prosecutorial acts, and of preventing the dilution of *Imbler* immunity into a mere pleading rule. If prosecutorial immunity could be circumvented through the mere targeting of out-of-court interrogations which culminate in and cause injury only through the presentation of in-court testimony, it would be meaningless for all but those few prosecutors who postpone their entry into a case until it reaches the courtroom. Neither § 1983 nor this Honorable Court's limitations on immunity were intended to discourage prosecutors from fully investigating the cases they present in court. To the contrary, only illegal or unconstitutional investigative tactics need be deterred. Thus, absolute immunity will not help an overzealous prosecutor who uses excessive force to elicit a confession during an interrogation. *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989) (fourth amendment prohibits use of unreasonable force). Similarly, a prosecutor's interrogation of a suspect which ripens into an arrest without probable cause because of the suspect's well-grounded belief that he is not free to leave, would give rise to a compensable fourth amendment claim against the prosecutor. *See Burns*. However, where the interrogation is not conducted illegally, and only causes injury through in-court testimony shaped from the fruits of the interrogation, *Imbler* and its progeny prohibit the recovery of any damages from the prosecutor based upon his eliciting of false testimony.

2. The Manipulation of Boot Print Evidence

As with the interrogations, Petitioner does not seriously dispute the fact that the injury he suffered as a result of the manipulation of the boot print evidence occurred when the experts' opinions were put before the grand and petit juries (Petitioner's Brief, pp. 24-25). Accordingly, the source of injury approach again reveals that Petitioner's true claim is premised upon the prosecutors' eliciting of false testimony before judicial bodies, rather than any meetings they attended with the experts. Such conduct falls well within the umbrella of absolute immunity. *Imbler*, 424 U.S. at 425-27.

Even without resort to the source of injury approach, however, Petitioner's claim concerning the prosecutors' handling of the boot print evidence fails to allege conduct which escapes application of absolute immunity. While Petitioner alleges the prosecutors ignored one expert, manipulated two others, and "procured" a positive identification from a third, such allegations involve conduct which was critical to the decision to indict. Meetings with a variety of experts to fully evaluate the strength of an important piece of evidence are essential to an informed decision. The evaluation of evidence has been recognized by this Court to be essential to trial preparation and to the initiation of the criminal process. *Imbler*, 424 U.S. at 431 n. 33. *See also Ware v. Carey*, 75 Ill. App.3d 906, 394 N.E.2d 690, 694 (1979) (state's attorney is responsible for evaluating evidence to determine if an offense should be charged).

Moreover, the prosecutors' evaluation and development of the boot print evidence cannot be equated, as Petitioner attempts, to the "manufacturing" of evidence in the sense that a prosecutor might "plant" narcotics or a firearm on a suspect's person. The prosecutors' involvement with

the boot print evidence did not begin until after (1) Sheriff's detectives had concluded that the killer left a telling boot print on the door of the Nicarico residence; (2) Alex Hernandez had voluntarily come forward with statements implicating Petitioner in the murder; (3) Sheriff's police had obtained Petitioner's boots for comparison purposes; (4) a Sheriff's Department employee had conducted a preliminary comparison of the boot print with Petitioner's boot; and, (5) Sheriff Doria had forwarded the boot print to expert Edward German for analysis (J.A. 7-8).

After being advised of the foregoing information, the prosecutors were duty-bound to evaluate and develop the boot print evidence to assess whether it would support an indictment. Anything less would have constituted professional malfeasance. Accordingly, the prosecutors' evaluation and development of the boot print evidence cannot fairly be characterized as the manufacturing of evidence. As the court of appeals acknowledged, "it is word play to call prosecutors' endeavors in asking experts for assistance 'investigative' in the way hypnotizing or arresting suspects is" (J.A. 104) (distinguishing *Burns*).

D. The Source of Injury Approach is Consistent with and Supported by *Imbler*, *Burns* and other Applicable Precedent

Imbler was clearly intended to have more bite than it would under Petitioner's view, which restricts immunity to trial conduct only (*See* Petitioner's Brief, p. 18). That this is true is perhaps best illustrated by considering the full array of prosecutorial conduct for which absolute immunity was conferred in *Imbler*, and comparing it with the conduct at issue in both *Burns* and in the instant case.

After Imbler was charged, prosecutor Pachtman allegedly conspired with police to alter a police sketch of the murder suspect so that it would resemble Imbler. *Imbler*,

424 U.S. at 416. *See also* Complaint in *Imbler v. Pachtman*, No. 71-123-IH, p. 12 (hereinafter "*Imbler* complaint").[4] Clearly, the out-of-court preparation and alteration of a police sketch is at least as investigatory in nature as are interrogations and advising police concerning an arrest (*See Burns*), and it is more properly characterized as investigatory than is the manipulation of expert witnesses. Nonetheless, such conduct failed to deprive prosecutor Pachtman of immunity presumably because the only injury Imbler attributed to the altered sketch occurred when it was "used to aid in convicting" him and to deprive him of his "rights to a fair trial." *See Imbler*, 424 U.S. at 416; *Imbler* Complaint, p. 12.

Prosecutor Pachtman also allegedly suppressed a finger print expert's exculpatory opinion. *Imbler*, 424 U.S. at 415. Such a claim by nature implies that the prosecutor acquired knowledge out-of-court and culpably decided to refrain from introducing the information into the criminal justice process. Nonetheless, this Honorable Court deemed immunity under such circumstances essential to prevent claims against prosecutors for eliciting false testimony from simply being recast as suppression claims. *Id.* at 431-32 n. 34. Again, Imbler's suppression claim is similar to Petitioner's claim concerning Respondents' alleged suppression of Deputy Gorajczyk's opinion.[5]

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[4] The *Imbler* complaint is lodged with the Clerk of this Honorable Court.

[5] Actually, the suppression allegations against Prosecutor Pachtman were more serious than Petitioner's claim regarding Gorajczyk's opinion. While Imbler did not discover the suppression until well after his conviction, Petitioner's counsel learned of Gorajczyk's opinion on the eve of trial (J.A. 13). Thus, Petitioner suffered no constitutional violation. *See United States v. Williams*, 112 S.Ct. 1735 (1992) (no duty to disclose exculpatory evidence to grand jury).

Finally, Prosecutor Pachtman also asked police officers to delay the arrest of a prosecution eyewitness on unrelated charges until after he had completed his testimony, so that the witness' arrest could not be utilized to discredit his identification of Imbler as the murderer. *Imbler*, 424 U.S. at 430 n. 32. Viewed in a vacuum, such conduct is virtually indistinguishable from Prosecutor Reed's advice to police concerning an arrest in *Burns*.

When viewed in context, however, the difference between *Imbler* and *Burns* is grounded in the nature of the Petitioner's cause of action: in *Burns*, false arrest; in *Imbler*, deprivation of a fair trial. Indeed, in *Imbler*, this Honorable Court aptly recast the plaintiff's claim of investigatory misconduct "in its proper light" as "an effort to control the presentation of [the] witnesses' testimony, a task fairly within [the prosecutor's] function as an advocate." *Imbler*, 424 U.S. at 430 n. 32. Thus, in *Imbler*, as in the instant case, the Petitioner's true claim was premised upon the eliciting of tainted testimony. In *Burns*, by contrast, the prosecutor's advice caused an out-of-court injury.

Aside from *Imbler*, the Seventh Circuit's recasting of Petitioner's claim "in its proper light" as a means of fairly categorizing the prosecutors' acts is not unprecedented. In *Lee v. Willins*, 617 F.2d 320 (2nd Cir.), *cert. denied*, 449 U.S. 861 (1981), the court held that prosecutorial immunity applies even to investigative conduct where the plaintiff seeks to "recover for an injury arising solely from the prosecution—e.g., being compelled to stand trial or to suffer imprisonment or pretrial detention."[6] *Id.* at 322.

[6] The prosecutor in *Lee* was accused of wide-ranging pre-indictment investigatory conduct, including coercing perjured testimony by arresting and incarcerating two witnesses, threatening to take away a witness' baby, inducing another witness to refrain from testifying by dropping felony charges against her and supervising police officers who planted a pistol in Lee's possession. 617 F.2d at 321.

Only where out-of-court acts cause "harm [to be] inflicted independently of the prosecution" is immunity inapplicable. *Id.*

This Honorable Court also implicitly approved the same approach in its first look at prosecutorial immunity in *Yaselli v. Goff*, 275 U.S. 503 (1927) (*per curiam*), *aff'g* 12 F.2d 396 (2nd Cir. 1926). *Yaselli* involved a plaintiff who sought to avoid immunity by alleging that the defendant conspired to secure an appointment as a special assistant prosecutor in order to have a receiver appointed over plaintiff's company to facilitate the illegal inspection and seizure of plaintiff's personal papers so as to support an indictment.[7] However, the plaintiff did not sue under the fourth amendment for illegal search and seizure; he sued only for malicious prosecution.

The prosecutor's conduct in *Yaselli* was far more attenuated from the judicial process than that of Respondents here,[8] yet it was similar insofar as the alleged injury was caused solely through the prosecution. Accordingly, this Court discounted the Petitioner's allegations concerning out-of-court conduct and affirmed the Second Circuit's grant of prosecutorial immunity. *Yaselli*, 275 U.S. 503. *Accord Weaver v. Devendorf*, 3 Denio 117, 120 (1846) ("no public officer is responsible in a civil suit, for a judicial determination").

The rule to be gleaned from these cases and from the lower court's opinions in the present matter, is that the targeting of extra-judicial acts will not circumvent absolute

[7] In furtherance of the conspiracy to obtain the appointment, the defendant also allegedly caused manufactured evidence of criminal misconduct concerning the plaintiff to be misrepresented to the government. *Yaselli*, 12 F.2d at 398.

[8] Indeed, the defendant in *Yaselli* was not even a prosecutor when he conspired to secure the appointment.

immunity where an analysis of the plaintiff's complaint reveals a disguised claim for injuries caused by a prosecutor's charging decision or for his actions in front of judicial bodies.

Petitioner insists that his "challenge to the false evidence related primarily to the manufacture of the evidence, not its use against him in the criminal trial" (Petitioner's Brief, p. 24). For that reason, he argues that "litigation of this claim would not question or impinge upon the prosecutors' decision to prosecute Petitioner or introduce the evidence before the grand jury or at trial, but rather, (sic) Respondents' role at an earlier period of time when they were acting as, and with, police investigators" (Petitioner's Brief, p. 24).

But how can this be? The manufacturing of evidence is not redressable if it does not intrude upon a constitutionally guaranteed right of liberty or privacy. And, as the court of appeals pointed out, "[o]btaining assessments from an expert witness, and preparing that witness for trial, causes no injury apart from what happens in court" (J.A. 92-93). It is disingenuous, therefore, for Petitioner to suggest that litigation of the boot print evidence claim can be divorced from the prosecutors' "decision to prosecute or introduce the evidence before the grand jury or at trial," because it is only through the decision to prosecute and to present the evidence to judicial bodies that the conduct became constitutionally significant.

Petitioner also argues that the distinction between immunized and non-immunized conduct cannot rest on the "fortuity of prosecution," because prosecutors could then "launder" all investigative conduct through the judicial process to avoid civil liability (Petitioner's Brief, p. 26). This concern, however, is specious. The court of appeals emphasized that immunity is unavailable for a prosecutor's

interrogations or other investigative acts which deprive citizens of constitutional rights independent of the judicial process (J.A. 93-95). That being the case, a decision to prosecute will not benefit a prosecutor who has committed constitutional wrongs prior to the initiation of the judicial process. Accordingly, the continued availability of a remedy against prosecutors for unconstitutional investigative conduct which produces injury out-of-court eliminates any incentive for prosecutors to file charges as a means of avoiding liability.

E. Petitioner's False Arrest Claim is a Thinly Disguised Challenge to the Prosecutors' Obtaining of an Indictment

Respondents acknowledge that a prosecutor's forays into certain aspects of the criminal justice process are safer than others from a civil liability perspective. This is evident when *Imbler* is contrasted with *Burns*: the former having conferred absolute immunity from claims evolving from a prosecution, the latter withholding immunity for investigative conduct causing an arrest. Because Petitioner's case involves both false arrest and malicious prosecution claims, it is a rough amalgam of *Burns* and *Imbler*. Acknowledging Petitioner's false arrest claim for the first time in its second opinion, the Seventh Circuit remanded that claim to the district court for resolution of any constitutional claims against only those prosecutors who actually arrested Petitioner (J.A. 109).

The breadth of the Seventh Circuit's remand on the false arrest claim was properly limited in scope to those prosecutors who actually arrested Petitioner, rather than to those who may have caused his indictment, and thus, his arrest, through the grand jury process. As both this Court and the Seventh Circuit have acknowledged, absolute immunity for the decision to seek an indictment and

for the conducting of grand jury proceedings is well established. *See Burns v. Reed*, 111 S.Ct. at 1934 n. 6; (J.A. 92). If immunity from liability for such activities could be circumvented by simply titling the claim "false arrest," *Imbler* would again be reduced to a mere pleading rule. This is especially true in this case, because under Illinois law, the filing of a grand jury indictment requires the judiciary to "immediately issue a warrant for the arrest" of the charged person. *See* Ill.Rev.Stat. ch. 38, para. 111-2(d).

The fact that Petitioner was indicted by a duly convened grand jury, whereas Cathy Burns was arrested pursuant to the advice of a prosecutor and observations of police officers, supports the distinction between the scope of immunity applicable in the two cases. *Accord Malley v. Briggs*, 475 U.S. 335 (1985) (refusing to equate prosecutor's obtaining of indictment with police officer's securing of arrest warrant). Respondents, therefore, have no quarrel with *Burns'* placement of police officers and prosecutors on the same footing for immunity purposes when they act together to cause fourth amendment violations which occur outside the judicial process. Such conduct cannot fairly be characterized as essential to either the judicial process or to the decision to prosecute, nor can it be controlled or countered through the safeguards inherent in the criminal justice system. Moreover, neither the common law nor historical tradition support the application of absolute immunity to either prosecutors or other public officers charged with false arrest.

Such is not the case, however, where the Petitioner's injury, whether it be false arrest or some other constitutional deprivation, occurs because of a grand jury indictment. Immunity for a prosecutor's conduct before a grand jury, as well as for his actions in securing an indictment, are firmly entrenched in historical tradition and supported by the common law. *See, e.g., Griffith v. Slinkard*, 146 Ind.

117, 44 N.E. 1001 (1896) (prosecutor altered a grand jury true bill); *Turpen v. Booth*, 56 Cal. 65, 38 Am.Rep. 48 (1888) (grand juror's immunity); *Hunter v. Mathis*, 40 Ind. 356 (1872) (same). "The selection of evidence to present to the grand jurors, and the manner of questioning witnesses, can no more be the basis of liability than may the equivalent activities before the petit jury" (J.A. 92), *citing Gray v. Bell*, 712 F.2d 490, 502-05 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

Petitioner's laundering theory warns that evil prosecutors will be encouraged to pursue grand jury indictments as opposed to simply causing an arrest in concert with the police (Petitioner's Brief, pp. 35-36). Respondents suggest that this is a course of action to be encouraged. In addition to its obligation "to inquire into the existence of possible criminal conduct" (*Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)), the grand jury is equally duty bound to ensure that the innocent are protected from unfounded criminal prosecutions. *See Wood v. Georgia*, 370 U.S. 375, 390 (1962). Moreover, the supervisory power of the court attaches to grand jury proceedings, and transcripts of those proceedings must be made available for impeachment purposes in later criminal proceedings and, importantly, for the evaluation of claims of prosecutorial misconduct. *See* Ill.Rev.Stat. ch. 38, para 112-7. *See also People v. Goldberg*, 302 Ill.559, 135 N.E. 84 (1922); *People v. Linzy*, 78 Ill.2d 106, 398 N.E.2d 1 (1979). These procedural safeguards constitute important checks on prosecutorial conduct which are absent when the prosecutor pursues an arrest outside the judicial process. The judicial function performed by the grand jury which includes the presence of judicial safeguards against prosecutorial misconduct, thus supports the virtually unbroken line of precedent according prosecutors immunity for their conduct before grand juries.

Because the Petitioner's claim against the Respondents for allegedly engaging in pre-indictment misconduct only caused Petitioner injury through the introduction of testimony to the grand jury and at Petitioner's criminal trial, the court of appeals properly barred those claims under the doctrine of absolute immunity.

II. ABSOLUTE IMMUNITY APPLIES TO A PROSECUTOR'S ANNOUNCEMENT OF A CRIMINAL INDICTMENT WHICH ALLEGEDLY INTERFERES WITH A CRIMINAL DEFENDANT'S RIGHT TO A FAIR TRIAL

Respondent J. Michael Fitzsimmons' announcement of Petitioner's criminal indictment warrants separate treatment because, as acknowledged by the court of appeals, the public statements neither occurred in court nor did they constitute trial preparation (J.A. 105). Though the interrogations and obtaining of expert opinions also did not themselves occur in the courtroom, Petitioner's true claims in that context arose from the presentation of the fruits of those activities to the grand and petit juries. Fitzsimmons' extra-judicial statements are distinguishable in that they were never formally introduced into the trial, but are alleged only to have externally infected the process.

A. The Common Law's Immunizing of Judicial Officers from Malicious Prosecution Claims Supports Respondent Fitzsimmons' Entitlement to Immunity

To determine whether absolute immunity should apply, the Court initially "look[s] to the common law and other history for guidance," although " 'the precise contours of official immunity' need not mirror the immunity at common law." *Burns*, 111 S.Ct. at 1943, *quoting Anderson v. Creighton*, 483 U.S. 635, 645 (1987). In the present context, Respondents suggest that both the common law and historical tradition support the application of absolute immunity to Petitioner's unfair trial claim against Respondent Fitzsimmons.

At common law, immunity was often "tied to specific causes of action and specific actors." Kaufman, § 1983: *Absolute Immunity For Pretrial Police Testimony*, 16 Fordham L.Rev. 647, 655 (1988). Accordingly, immunity often depended to a large extent on the manner in which a particular cause of action was characterized. *Id.* In order to protect judicial determinations from relitigation in a civil context, therefore, judicial officers traditionally were held immune from malicious prosecution claims, without any differentiation concerning the varying forms of conduct which may have combined to form the malicious prosecution. *See* Townshend, *Slander and Libel*, § 227, pp. 395-96 (3d Ed. 1877). This same approach persevered when immunity was later conferred on prosecutors from claims of malicious prosecution or deprivation of a fair trial. *See Griffith v. Slinkard, supra*; *Yaselli v. Goff, supra*, *Imbler v. Pachtman, supra.*

In light of the immunity traditionally accorded prosecutors from malicious prosecution and unfair trial claims,[9] Respondents contend that Petitioner's claim against Fitzsimmons would have been barred by immunity at common law had the issue been squarely presented.

The mere fact that the specific issue of immunity for press conferences was not considered at the common law is not controlling. Press conferences and the impact of

[9] Malicious prosecution and unfair trial claims are essentially indistinguishable for purposes of assessing the scope of immunity. While the former challenges the decision to prosecute and the latter focuses on the conduct of the trial itself, both target the very essence of the prosecutor's quasi-judicial function, and are equally likely to be the product of a disgruntled criminal defendant's ire against the judicial system.

mass media on the fairness of criminal trials were not contemplated by the common law. If Congress did not intend to abrogate existing common law immunities when enacting § 1983 (*Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)), it is equally unlikely that Congress intended future courts to ignore unanticipated and unforeseen developments when interpreting the scope of those immunities.

Moreover, because the common law lends support to an immunity from malicious prosecution or unfair trial claims, Respondents contend that it is unnecessary to locate a corresponding common law immunity for the specific prosecutorial act (in this case a press conference) which caused the unfair trial. Given the nature of the Petitioner's cause of action, it is beyond dispute that the Petitioner seeks to recover for a prosecutor's alleged efforts to bring about a criminal conviction by tilting the trial process in his favor. As argued previously (*see supra*, pp. 20-24), an act which is characterized as either investigative or administrative in a particular context, may, nonetheless, be unredressable under principles of absolute immunity when the Petitioner seeks to relitigate a criminal trial through a malicious prosecution or unfair trial claim. *Compare Imbler, supra*, (absolute immunity for prosecutor who advised police to delay arrest of trial witness) *with Burns, supra*, (only qualified immunity for prosecutor's advice to police officers concerning arrest).

B. Policy Considerations Support Absolute Immunity from Liability for the Announcement of a Criminal Indictment

The policy considerations upon which principles of absolute immunity are premised are furthered in the context of Petitioner's unfair trial claim against Respondent Fitzsimmons. The risk of entanglement in vexatious and diverting civil litigation is enormous whenever a criminal

defendant is allowed to sue a prosecutor for deprivation of a fair trial. It is fairly predictable that a disgruntled criminal defendant will often seize upon any available vehicle to permit the relitigation of his criminal case in a civil context. *See Imbler*, 424 U.S. at 424-25. Given the availability of absolute immunity for a prosecutor's in-court activities, the absence of immunity for press statements may provide the only hook available to a criminal defendant who believes he has been injured by the judicial system. The present case provides a lucid example: although Petitioner's complaint details a variety of prosecutorial conduct alleged to have deprived him of a fair trial, his petition for a writ of *certiorari* presses only the media claim against Respondent Fitzsimmons.

Immunizing the prosecutor from entanglement in unfair trial claims tied to the announcement of a criminal indictment, is palatable given the plethora of procedural safeguards designed to ward off external media infections of the criminal trial process. Specifically, jury *voir dire*, peremptory challenges, challenges for cause, motions to change venue, and ultimately, motions for dismissal, are all intended to prevent the trial process from being sabotaged by outside influences (*See* J.A. 90). Indeed, this Honorable Court has repeatedly relied upon the availability of such judicial checks on prosecutorial misconduct as a determinative factor in assessing the scope of immunity. *See Burns, supra*, 111 S.Ct. at 1942, 1944; *Imbler, supra*, 424 U.S. at 427. To the extent Petitioner contends these procedural safeguards did not work effectively in his criminal trial, his claim against Respondent Fitzsimmons is revealed as a "disguised attack on either the institution of the prosecution itself, or the decisions of the judges at the bail hearing and trial" (J.A. 90).

Checks on prosecutorial misconduct such as professional discipline also minimize the need for exposing prosecu-

tors to civil rights liability for making improper press statements. *See Malley v. Briggs*, 475 U.S. 335, 343 n. 5 (1985). While Petitioner argues that these alternative methods of deterrence have proved ineffectual since *Malley*, the fact is that the state bars are gradually becoming increasingly vigilant in policing prosecutors. *See, e.g., Zimmermann v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn. 1989) (prosecutor reprimanded for making extra-judicial statements); *In re: Disciplinary Proceedings Against Allen R. Brey*, 171 Wis.2d 65, 490 N.W.2d 15 (1992) (prosecutor suspended from practice for 60 days for misconduct in connection with criminal prosecution); *People v. Reichman*, 819 P.2d 1035 (Colo. 1991) (public censure of prosecutor for filing false criminal complaint in effort to protect undercover officer). *See also In re: Friedman*, 76 Ill.2d 392, 392 N.E.2d 1333 (1979) (prosecutor not disciplined because action in conducting investigation appeared proper).[10]

Other important public policy concerns support the extension of absolute immunity to a prosecutor's announcement of a criminal indictment. One of the primary functions of an Illinois State's Attorney is to "commence and prosecute all actions, suits, indictments and prosecutions."

[10] Petitioner's citation to several cases in which he served as counsel is not persuasive (*See* Petitioner's Brief, p. 29 n. 8). While Petitioner's counsel charged various prosecutors with misconduct in all of the cited cases, none resulted in a finding of misconduct against any prosecutor. *See Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979) (ordering new trial); *Palmer v. City of Chicago*, 562 F.Supp. 1067, 1071 (N.D.Ill. 1983), *rev'd on other grounds*, 755 F.2d 560 (7th Cir. 1985) (police policy of secreting exculpatory evidence); *Jones v. City of Chicago*, 856 F.2d 985, 989-90 (7th Cir. 1988) (reviewing judgment against police officers and forensic witness, but not prosecutor, in malicious prosecution case); *People v. Wilson*, 116 Ill.2d 29, 506 N.E.2d 571 (1987) (no finding that prosecutor had knowledge of police brutality).

Ill.Rev.Stat. ch. 14, para. 5 (1987). Concomitant to those responsibilities is his obligation to make public statements to inform the public about the activities of the office. *See Ware v. Carey*, 75 Ill.App.3d 906, 394 N.E.2d 690, 695 (1979), *citing ABA Standards Relating to the Administration of Criminal Justice, Compilation*, p. 77 (1974). In light of that obligation, prosecutors would be in a "Catch 22" if immunized from the decision to indict, but not for the announcement of that indictment.

The chilling effect of such a precedent warrants serious consideration. If faced with liability for the announcement of an indictment, prosecutors will be predictably reluctant to inform the public of the basis for indictments, particularly in cases of substantial public interest where the demand for information is greatest. Reluctance would be greater in such cases because the media's more expansive coverage of the announcement would increase the likelihood of a civil rights claim linked to unfavorable publicity. Such reluctance would be inconsistent with the prosecutor's duty to keep the public informed of the important activities of the office and could lead to the further erosion of confidence in law enforcement in general.

Indeed, the criminal trial process is, by nature, public, as the full power of the state is exerted upon the accused. Such governmental action is not permissible in a democratic society without public scrutiny and accountability. *See In re: Matter of Grand Jury Proceedings: Krynick v. Falk*, 1992 WL 360588, ____ F.2d ____ (7th Cir. Dec. 8, 1992). Against that backdrop, insulating the announcement of criminal indictments from civil rights challenges is vital to "protecting the free flow of information from the prosecutor" to the public and to "preservation of public awareness and the proper performance of a prosecutor's duties." *Strong v. Slaton*, 510 F.Supp. 161, 163-64 (N.D.Ga. 1981).

C. Qualified Immunity Provides Inadequate Protection from Unfair Trial Claims

Petitioner has argued that the expanded scope of qualified immunity is sufficient to further the policy interests described above without unnecessarily restricting a victim's right of redress against corrupt prosecutors. However, notwithstanding the increased protections provided by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity is wholly inadequate to protect a prosecutor from the type of claim Petitioner asserts against Respondent Fitzsimmons.

A plaintiff may defeat qualified immunity by identifying a violation of a "clearly established . . . constitutional right of which a reasonable person would have known." *Id.* at 818. Applying that standard in the present context, it has been clearly established for many years that expansive media coverage implicates a criminal defendant's due process entitlement to a fair trial, particularly in high profile, controversial cases. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *People v. Taylor*, 101 Ill.2d 377, 462 N.E.2d 478, 482-88 (1984). Accordingly, claims such as Petitioner's are not the type which are fairly susceptible to pre-trial resolution under *Harlow*, but rather, lend themselves to factual disputes more readily capable of resolution at trial.

Any claim alleging deprivation of a fair trial, regardless of the type of challenged prosecutorial conduct, necessarily involves the relitigation of the criminal case. In the context of a media claim, the parties would need to evaluate the voir dire testimony of all the jurors from Petitioner's criminal trial to assess their media awareness at the time of the trial. Petitioner would then be required to relitigate the entirety of the evidence utilized against him in the criminal case in order to prove that the jury's failure to acquit was not attributable to the State's evidence, but

rather, to the prosecutor's inflammatory announcement of the indictment. Though such a claim would be undoubtedly difficult to prove, the opportunity to secure dismissal of such a claim early in the litigation would be minimal.[11] Accordingly, such a claim would entangle the prosecutor in the relitigation of the criminal case, in direct contravention of the principles upon which absolute immunity was established. *Imbler*, 424 U.S. at 425-26.

D. Immunizing Respondent Fitzsimmons from Petitioner's Unfair Trial Claim is Consistent with the "Functional Approach"

Petitioner argues that immunity for public statements is inconsistent with the functional approach applied in cases such as *Forrester v. White*, 484 U.S. 219, 227 (1988). However, a closer examination of *Forrester* and other applicable precedent supports, rather than betrays, the court of appeals' focus on the nature of Petitioner's cause of action in assessing the scope of prosecutorial immunity. In *Forrester*, a judge was not entitled to absolute immunity for his administrative act of terminating a probation officer on account of her sex. Notably, the probation officer's injury—deprivation of employment—was unrelated to any pending or contemplated criminal prosecution.

Other scenarios can be imagined, however, in which a judge's termination of an employee would be worthy of absolute immunity under a functional approach. Assume that the probation officer had been terminated in advance of giving testimony favorable to a defendant in a pending criminal matter. After the criminal trial, the criminal defendant sued the judge and the prosecutor, claiming

[11] It would seem pre-trial dismissal would be dependent upon a showing that jurors who voted to convict were not privy to the announcement of the indictment.

that they conspired to fire the probation officer in order to provide the prosecution with ammunition to discredit her testimony at trial.

Under the foregoing scenario, the civil rights claim would be premised on interference with the criminal defendant's right to a fair trial and should fall within the umbrella of immunity. Indeed, such a claim would be virtually identical to the claim in *Imbler* premised upon the prosecutor's efforts to delay an arrest so as to deprive the defense with fodder for impeachment. *See Imbler*, 424 U.S. at 431 n. 32. As implicitly recognized in *Imbler*, preventing such a claim to escape the umbrella of immunity would expose both jurists and prosecutors to frequent retaliatory litigation by criminal defendants targeting out-of-court conspiracies allegedly designed to interfere with the fairness of a trial. *Id.* This example helps illustrate that the degree of immunity to be accorded a particular act may turn upon the nature of the plaintiff's claim.

This Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), also provides a useful illustration. The United State's Attorney General was denied immunity for authorizing the installation of illegal wiretaps to seek evidence against persons other than the plaintiff. *Id.* at 520-24. The plaintiff's injury—illegal search and seizure—was completed out of court without regard to the criminal justice process, which was never initiated against him.

Assuming, however, that the plaintiff in *Mitchell* was the target of the criminal prosecution, and that he had sued the Attorney General for introducing illegally intercepted conversations at trial, immunity would surely have applied. Under that hypothetical, any claim that the criminal justice process was tainted through the use of illegally seized evidence would have been redressable during the prosecution. Accordingly, while the targeted illegality was

identical under both scenarios—illegal wiretapping—immunity should apply only where the injury stemmed from the criminal judicial process.

The absence of an out-of-court injury stemming from Fitzsimmons' public statements also undermines Petitioner's efforts to identify a conflict between the lower court's decision and the Eleventh Circuit's decisions in *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983), and *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988). Though the Seventh Circuit actually identified such an inter-circuit conflict (J.A. 91), the fact is that none exists because both *Marx* and *Stepanian* involved an injury only to reputation. Neither *Stepanian* nor *Marx* involved the ability of the criminal process to ensure a fair trial, which minimizes the need for exposing prosecutors to damages.[12]

Against that backdrop, the court of appeals' application of immunity to petitioner's unfair trial claim against

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[12] All but one of the remaining cases relied on by Petitioner are also inapposite because they did not involve an injury stemming from a criminal prosecution. *See Marrero v. City of Hialeah*, 625 F.2d 499, 511 (5th Cir. 1980) (defamatory press statements harmed plaintiff's business); *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989) (damage to reputation); *Helstocki v. Goldstein*, 552 F.2d 564 (3rd Cir. 1977) (press leak injured plaintiff's political prospects); *Walker v. Cahalan*, 542 F.2d 681 (6th Cir. 1976) (defamation claim), *cert. denied*, 430 U.S. 966 (1977); *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980).

But see Powers v. Coe, 728 F.2d 97, 103 (2nd Cir. 1984) (denial of a fair trial attributable to prosecutor's covert leaking of secret grand jury information). Note, however, that none of the public policy reasons encouraging prosecutors to publicly announce indictments are furthered through immunizing covert leaks. Moreover, to the extent *Powers* is analogous to the instant case, it is of questionable precedential value in light of the same court's prior decision in *Lee v. Willins*, 617 F.2d 320, 322 (2nd Cir.), *cert. denied*, 449 U.S. 861 (1980) (immunity for even investigative acts which only cause injury through judicial process).

Respondent Fitzsimmons is consistent with and supported by *Forrester*, *Mitchell* and other precedent visiting analogous issues. The functional approach is well served through immunizing prosecutors from claims challenging the decision to indict or to influence the outcome of the trial process, particularly because the alleged misconduct is specifically subject to correction through the procedural safeguards inherent in the criminal justice process.

E. Petitioner's Claims Concerning Press Statements Other Than the Announcement of the Indictment are not Within the Scope of Review

This Honorable Court granted Petitioner's petition for a writ of *certiorari* on two questions, the first involving certain Respondents' involvement in a pre-arrest and pre-indictment investigation; and the second involving Respondent Fitzsimmons' announcement of Petitioner's indictment. The scope of immunity for that conduct has been addressed in arguments I and II *supra*. Petitioner, however, now asks this Honorable Court to address the application of immunity to Respondents' out-of-court press statements (aside from Fitzsimmons' announcement of the indictment). This Honorable Court should decline Petitioner's invitation to expand the scope of review.

Petitioner's complaint alleged that a variety of press statements contributed to his high bail and the deprivation of his right to a fair trial. However, only Respondent Fitzsimmons' announcement of Petitioner's indictment occurred prior to the conclusion of Petitioner's criminal trial, and only it could possibly have contributed to the setting of Petitioner's bail or to any unfairness in Petitioner's trial.[13]

[13] Following the announcement of Petitioner's indictment, the next public statement occurred after the completion of Petitioner's

(Footnote continued on following page)

For that reason, the district court dismissed Petitioner's claims arising from the prosecutors' public statements with the sole exception of Fitzsimmons' announcement of the indictment (*See* J.A. pp. 49-50). Likewise, the Seventh Circuit has twice limited its review in the same fashion (J.A. 89-92; 105-08).

In both of his petitions for a writ of *certiorari*, and in his brief to this Court, Petitioner similarly limited his questions presented for review concerning the publicity issue to Fitzsimmons' announcement of Petitioner's indictment. Accordingly, this Honorable Court should also confine itself to that question.

To the extent this Honorable Court deems Petitioner's unfair trial claim to include press statements other than the announcement of the indictment, absolute immunity should apply to those statements for the same reasons as discussed at pages 28-38 *supra*.

[13] *continued*

trial and involved Prosecutor Thomas Knight's declaration that Petitioner would be retried (*See* J.A. p. 15, para. 58). Petitioner next alleged that Fitzsimmons and Knight made "additional *post-trial* statements" declaring that Petitioner was guilty" (*See* J.A. p. 15, para. 59) (emphasis added). Petitioner also challenged Prosecutor Knight's public statements which discredited Brian Dugan's confessions (*See* J.A. pp. 16-17, para. 65). Dugan did not confess until June of 1985, several months after Petitioner's trial had been completed (*See* J.A. pp. 16-17, paras. 60-61). Next, Petitioner alleged that Prosecutor Robert Kilander deliberately caused a false and inculpatory statement to be published about Petitioner in September of 1985, again several months after Petitioner's trial (*See* J.A. p. 17, para. 68). Finally, Petitioner claims the prosecutors made pretextual public statements explaining the dismissal of the charges in March, 1987 (*See* J.A. p. 18, para. 72).

III. THE COURT SHOULD DECLINE PETITIONER'S INVITATION TO OVERRULE *IMBLER*'S APPLICATION OF ABSOLUTE IMMUNITY TO THE DECISION TO INDICT AND PROSECUTE

A. Petitioner's Claim Concerning Immunity for the Decision to Indict is Beyond the Scope of Review

Petitioner asks this Honorable Court to overrule *Imbler* to the extent it immunizes malicious decisions to indict and prosecute. However, the decisions to indict, prosecute and re-prosecute cannot fairly be characterized as part of the pre-indictment investigation. As with the press statements, therefore, those decisions are in no sense within the scope of review. To the extent this Honorable Court disagrees, Respondents will respond on the merits.

B. Prosecutorial Immunity for the Decision to Indict is Well-Grounded in the Common Law and In Public Policy

The decisions to indict and prosecute lie at the very heart of the prosecutor's role as a judicial officer, and are perhaps the clearest examples of immunized conduct under *Imbler*. Although Petitioner acknowledges that this Court recognized the existence of absolute prosecutorial immunity at common law in *Imbler* and *Yaselli*, petitioner nevertheless contends that immunity should be denied for malicious decisions because no pre-1871 authority immunizes a prosecutor from malicious prosecution claims (Petitioner's Brief, pp. 39-43).

At the outset, Respondents concur with Petitioner that there is no direct authority prior to 1871 finding a public prosecutor absolutely immune for malicious prosecution. In fact, the first reported case addressing the issue was *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001 (1896). In holding that a local prosecutor could not be sued at

common law for malicious prosecution, the court in *Griffith* quoted the following passage from Townshend, *Slander and Libel*, § 227, pp. 395-96 (3d Ed. 1877):

> Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted, but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.

146 Ind. at 121-22. This formulation of absolute immunity "is as old as the common law itself." *Weaver v. Devendorf*, 3 Denio 117, 120 (1846). It "extends to judges from the highest to the lowest; to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power." *Id.*

Whether immunity attached to a public officer's acts at common law depended not on the "name applied to the office or the officer . . . [but rather] the character of the act. If it be judicial or quasi-judicial in its nature, the officer acts judicially and is exempt." *Mechem on Public Officers*, § 638, p. 421 (1890). *Accord Imbler*, 424 U.S. at 430 (applying functional approach to immunity). Conversely, "[w]hen duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct." *Rochester White Lead Co. v. City of Rochester*, 3 N.Y. 463, 466-67 (1850).

Given that the common law provided absolute immunity to public officers exercising judicial-like duties, it is not

surprising that courts specifically applied that doctrine to public prosecutors. *See Yaselli*, 12 F.2d at 403; *Watts v. Gerking*, 111 Oreg. 641, 228 P. 135 (1924); *Smith v. Parman*, 101 Kans. 115, 165 P. 663 (1917); *Griffith v. Slinkard*, *supra*. Nor is application of this common law immunity doctrine to prosecutors improper, because " 'the precise contours of official immunity' need not mirror the immunity at common law." *Burns*, 111 S.Ct. at 1943, *quoting Anderson v. Creighton*, 483 U.S. 635, 645 (1987). A prosecutor's decision on whether to prosecute is, at the very least, quasi-judicial. *Imbler*, 424 U.S. at 438; *Yaselli*, 12 F.2d at 404; *Smith*, 101 Kans. at 116. Like judges and jurors, prosecutors "exercise a discretionary judgment on the basis of evidence presented to them." *Imbler*, 424 U.S. at 423 n. 20. Furthermore, the policy reasons which favor giving judges and jurors absolute immunity at common law apply with equally compelling force to prosecutors. *Imbler*, 424 U.S. at 422-23. Given the strong analogies between judges, jurors and prosecutors, it is improbable that an action would lie at common law against a public prosecutor for his malicious decision to prosecute had the issue been squarely presented to a court.

In his brief, however, Petitioner suggests that the quasi-judicial status of a prosecutor, itself, is the very reason why absolute immunity is not available. In support of this suggestion, Petitioner relies heavily on *Newell On Malicious Prosecution* (1892). In this treatise, the author states that a quasi-judicial officer "cannot be called upon to respond in damages for the honest exercise of his judgment within his jurisdiction, however erroneous or misguided that judgment may be." *Id.* at § 68, p. 166 (footnote omitted). The only authority cited by the author, however, is Mechem's treatise on public officers, which, as stated above, actually sets forth an early formulation of the functional approach to absolute immunity recognized at common law and reaffirmed in *Imbler*.[14]

Petitioner also cites the concurring and dissenting opinion in *Burns* in which Justice Scalia posited that quasi-judicial public officers enjoyed only qualified immunity at common law. *Burns*, 111 S.Ct. at 1947, *citing Billings v. Lafferty*, 31 Ill. 318, 322 (1863) and *Reed v. Conway*, 20 Mo. 22, 44-52 (1854).[15] However, the application of qualified immunity to quasi-judicial officers was anything but uniform at common law, despite the *Reed* court's suggestion that a public officer's responsibility for malicious acts was "clearly established and maintained" in the common law. *Id.* at 44. Indeed, the common law is equally replete with cases holding public officers immune from liability regardless of malicious motives. *See generally*, *Weaver v. Devendorf*, 3 Denio 117, 120 (1846) (and cases cited therein); *Mechem*, § 640, pp. 425-27.

The lack of uniformity in the common law regarding immunity for public officers caused Mechem, in his treatise,

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[14] Petitioner also cites post-1871 case law which allowed individuals to maintain malicious prosecution actions against public prosecutors. However, the only case which actually refers to the immunity doctrine in any meaningful fashion is *Leong Yau v. Carden*, 23 Hawaii 362 (1916). In *Leong Yau*, the court rejected *Griffith v. Slinkard* without any explanation and cited Newell's treatise on malicious prosecution in support of its holding that a public prosecutor, as a quasi-judicial officer, could be sued for malicious prosecution. *Leong Yau*'s holding, therefore, is tenuous and represents an anomaly of the law in light of the overwhelming precedent to the contrary.

[15] The focus of Justice Scalia's dissent in *Burns* was limited to the prosecutor's act of seeking a search warrant, not the prosecutor's decision to seek an indictment. The latter function is clearly in the nature of a judicial duty and, therefore, reflects the prosecutorial activity traditionally afforded absolute immunity.

to declare the area of law uncertain and confusing. *See Mechem*, § 640, p. 424. However, Mechem concluded that the case law granting absolute immunity to public officers is "the better and the safer rule." *Id.* at § 641, p. 427. Elaborating on that conclusion, Mechem stated:

> If the action is really judicial, the immunity which adheres to judicial action should be applied whether the officer sits upon the bench of a regularly established court or not. As has been said, if the action can be maintained by the allegation of improper motives, no litigant will fail to allege that they existed, and the public officer may constantly be called upon to defend himself from actions at law brought with motives fully as malicious as those which are asserted to have inspired him. Public policy, it is believed, requires that *all* judicial actions shall be exempt from question in private suits (emphasis in original) (footnote omitted).

Id.

Clearly, there existed divergent views before 1871 on whether quasi-judicial officers had absolute or qualified immunity from personal liability in civil actions stemming from their official duties. However, for purposes of applying common law immunities in § 1983 actions, there is strong support in the early common law for the proposition that no public official, regardless of title or status, could be held liable in a civil lawsuit for a judicial determination, even if it were alleged that the officer acted maliciously in making that determination. Thus, the absolute immunity accorded public officials at common law and the public-policy reasons underlying that immunity, lend more than adequate support to this Court's immunizing of the decision to indict in *Imbler*.

IV. THIS COURT SHOULD DECLINE PETITIONER'S INVITATION TO OVERRULE *IMBLER* TO THE EXTENT IT IMMUNIZES PROSECUTORS FROM LIABILITY FOR THE SUPPRESSION OF EVIDENCE

Petitioner argues that this Court should overrule *Imbler* and adopt Justice White's concurrence suggesting that immunity be unavailable to claims alleging willful suppression of evidence (Petitioner's Brief, p. 48). Petitioner contends that this case "presents the exact exception articulated by Justice White—Respondents withheld crucial favorable boot print evidence from the grand jury, from the court, and from defense counsel" (Petitioner's Brief, p. 48).

Respondents, however, suggest that this case does not squarely present a question concerning the scope of immunity for the suppression of evidence. In *Imbler*, the plaintiff alleged that he was wrongfully convicted in part due to the suppression of a fingerprint expert's exculpatory opinion. In the present case, by contrast, the Petitioner concedes he "discovered the information independently on the eve of trial." Thus, Petitioner does not have a claim for suppression of evidence at trial based upon *Brady v. Maryland*, 373 U.S. 83 (1963). Moreover, to the extent Petitioner relies upon the withholding of Gorajczyk's opinion from the grand jury, this Court recently confirmed that a prosecutor is under no duty to disclose exculpatory evidence to a grand jury. *United States v. Williams*, 112 S.Ct. 1735 (1992). Accordingly, the absence of a constitutional violation stemming from the alleged suppression of evidence renders it unnecessary for this Court to consider Petitioner's invitation to adopt Justice White's concurrence in *Imbler*.

To the extent this Honorable Court deems the issue fairly presented, Respondents simply point out that the rationale upon which Justice White's concurrence was re-

jected in 1976 still rings true today. *See Imbler*, 424 U.S. at 431 n. 34. In addition, as argued in the context of Petitioner's press claim against Respondent Fitzsimmons, a prosecutor's immunity from claims of malicious prosecution or deprivation of a fair trial flows from the nature of the cause of action, rather than from a strict application of the challenged prosecutorial act. Accordingly, this Court should decline Petitioner's invitation to overrule *Imbler* to the extent it immunizes a prosecutor from liability for the suppression of evidence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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